

Regulation of Electrical and Electronic Products

What is in a Name? – Regulation of Electrical and Electronic Products

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Summary: *Directive 2002/96/EC on waste electrical and electronic equipment (WEEE) and Directive 2002/95/EC on the restriction of the use of certain hazardous substances in electrical equipment (RoHS) marked both a major step by the European Community in regulating the environmental impact of products and possibly the high-water mark of Community environmental product regulation. In this article the author describes the state of transposition of the WEEE and RoHS Directives; considers what “electrical and electronic equipment” is regulated; and outlines issues still to be resolved in environmental product regulation.*

I. Introduction

Directive 2002/96/EC¹ on waste electrical and electronic equipment (WEEE) and Directive 2002/95/EC² on the restriction of the use of certain hazardous substances in electrical equipment (RoHS) were both adopted on 27 January 2003. Soon after, the Directives entered into force on 13 February 2003.³ Member States were due to transpose the Directives by 13 August 2004.⁴

These two Directives are important pieces of environmental product regulation. They mark a major step by the European Community in regulating the environmental impact of products. This is legislation that impacts on an industry, the so-called Tech sectors, whose products have largely remained free of regulation at the Community level. Also, the WEEE Directive is innovative, providing for Individual Producer Responsibility,⁵ and, unusually, retroactive financial responsibility obligations on producers for historic waste.⁶

Just as the Community has taken this step forward, it is possible that the WEEE and RoHS will mark the high-water mark of Community environmental product regulation. It has been hinted that the RoHS Directive will at some point in the future be merged into a new “chemicals policy”.⁷ Also, the WEEE and RoHS Directives do not fit comfortably into the “soft law” regulatory approach favoured by the Commission’s Integrated Product Strategy.⁸

This article considers:

1. the state of transposition of the WEEE and RoHS Directives;
2. what “electrical and electronic equipment” is regulated?; and
3. issues to be resolved in environmental product regulation.

II. Transposition of the WEEE and RoHS Directives

Introduction

Both Directives set demanding deadlines for Member States and producers to meet. Member States set themselves a “transposition” deadline of 13 August 2004.⁹ A year later, under the WEEE Directive, the WEEE collection systems must be operation¹⁰ and the WEEE treatment and financing obligations enter into force.¹¹ By 1 July 2006 the RoHS hazardous substances restrictions enter into force.¹² The WEEE Directive was amended a few weeks after its publication in the Official Journal, with an amendment to Article 9, which deals with the finance provisions for the take back professional equipment.¹³

Sticking to the deadlines is important to help producers know with what legislation they will have to deal, and how they can meet their obligations under both Directives. To date, many producers are still unsure what they will have to do in most Member States.

State of transposition on 13 August 2004

By 13 August 2004 Member States had signed up to:

1. bring into force laws, regulations and administrative provisions necessary to comply with this Directive;
2. immediately inform the Commission that they have transposed the Directive,¹⁴ and

¹ OJ 13.2.2003 L37/24.

² OJ 13.2.2003 L37/19.

³ RoHS Art. 10; WEEE Art. 18.

⁴ RoHS Art. 9(1); WEEE Art. 17(1).

⁵ WEEE Art. 8(2).

⁶ WEEE Art. 8(3).

⁷ RoHS Art. 4(3).

⁸ “Integrated Product Policy Building on Environmental Life-Cycle Thinking”. Commission Communication. 18.6.2003, COM (2003) 302 final.

⁹ RoHS Art. 9(1), WEEE Art. 17(1).

¹⁰ WEEE Art. 5 (2).

¹¹ WEEE Arts 8(1) and 9.

¹² RoHS Art. 4(1).

¹³ Directive 2003/108/EC amending Directive 2002/96/EC on waste electrical and electronic equipment (WEEE). OJ 31.12.2003 L. 345/106.

¹⁴ WEEE Arts 9(2) and 17(2) repeat the communication requirement by Member State to the Commission.

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3. refer to the Directive in their implementing measure.

According to the Commission,¹⁵ on 13 August 2004 Greece was the only Member State to have met its transposition deadline. Accession States had to meet the same transposition deadline, despite the fact they reached a formal agreement on 30 March 2004.¹⁶ However, it seems that some Member States' work had not filtered through to the Commission in the European summer vacation. In addition to Greece, the Netherlands and Latvia, transposed the Directives on time. Belgium's Flemish and Brussels regions were partially in compliance.

Why only three of the 25 Member States met this key legal deadline may raise concerns, not least because it could create a precedent for meeting obligations in future. Why this should be the case is worth considering. An unscientific survey¹⁷ of Member States enquiring if they had transposed the WEEE and RoHS Directives on time, and, if not, what reasons were there for the delay produced some interesting results. Reasons offered included: the complex texts of the directives; unsolved questions; and protracted TAC debate. These concerns are dealt with in section IV of this article.

Whilst it could have been expected that most Member States would have adopted transposition measures by the end of 2004, some did not. The European Commission commenced enforcement actions against eight Member States in July 2005.¹⁸ Some Member States, France, Italy, and the United Kingdom, had not transposed either Directive. Estonia, Malta and Poland had transposed the RoHS Directive but had not transposed the WEEE Directive and its amendment. On the other hand, Greece had not transposed the amendment to the WEEE Directive.

III. What electrical and electronic equipment do WEEE and RoHS cover?

What is "electrical and electronic equipment" (EEE)?

The WEEE Directive regulates most, but not all "electrical and electronic equipment". The WEEE Directive sets down an initial three-part test to determine if an application is covered. The same test is repeated in the RoHS Directive.

First, EEE is

"equipment that is dependent on electric currents or electromagnetic fields in order to work properly, and equipment for the generation, transfer and measurements of such currents and fields and falling under the categories set out in Annex IA and designed for use with a voltage exceeding 1000 Volt for alternating current and 1500 Volt for direct current."¹⁹

This is intended to compromise all appliances run by electricity²⁰ and it includes the equipment itself and the power generation (e.g. wires) in the equipment. If the equipment is not dependent on electricity to work properly, for example, a petrol-driven lawnmower, as distinct from an electric powered lawnmower, it is not EEE under the terms of the WEEE Directive.

If the product meets first part of the test, it is necessary to move to part two. Second, Annex IA provides an exhaustive list of 10 types of categories of EEE that are covered by the WEEE Directive. The broad categories are:

1. large household appliances;
2. small household appliances;
3. IT and telecommunications equipment;
4. consumer equipment;
5. lighting equipment;
6. electrical and electronic tools (with the exception of large-scale stationary industrial tools);
7. toys, leisure and sports equipment;
8. medical devices (with the exception of all implanted and infected products);
9. monitoring and control instruments; and
10. automatic dispensers.

These categories in Annex IA are exhaustive but they are supplemented by Annex IB, which provides an illustrative list of products that fall under Annex IA. Annex IB is not an exhaustive list.²¹

The third and final requirement is that only EEE that is "designed for use with a voltage not exceeding 1000 Volt for alternating current and 1500 Volt for direct current" is regulated. The "purpose of the indicated voltage limits is to ensure that large industrial equipment, which might be construed as falling under one of the categories of Annex I A, is not covered by the Proposal. The voltage limits are the upper limits set out in Art. 1 of Council Directive 73/23/EEC of 19 February 1973 on the harmonisation of the laws of Member States relating to electrical

¹⁵ IP/04/1033. Brussels, 13 August 2004, "Electronic waste: two important Directives due to be implemented in EU Member States".

¹⁶ Council Decision of 30 March 2004 granting the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Slovakia and Slovenia certain temporary derogations from Directive 2002/95/EC on waste electrical and electronic equipment (OJ 6.4.2004 L100/33).

¹⁷ Email and phone calls to Member States after 13 August 2004.

¹⁸ "Electronic and electrical waste: Commission takes legal action against eight Member States". Commission Press Release. IP/05/895, 11 July, 2005.

¹⁹ Article 3(a) WEEE and RoHS.

²⁰ Article 3(a) WEEE and RoHS.

²¹ Page 28, Art. 2, Explanatory Memorandum to the Proposal for a Directive of the European Parliament and of the Council on waste electrical and electronic equipment (2000/0158 (COD)).

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equipment designed for use within certain voltage limits".²²

What is WEEE under the WEEE Directive?

First, the provisions of the WEEE Directive are concerned only with "waste" electrical and electronic equipment. EEE becomes WEEE when it is discarded.²³ At this moment all "components, subassemblies, and consumables" are WEEE. So, the WEEE Directive does not apply to "consumables", which are "short-term replaceable/disposable parts of the equipment, such as toner cartridges or batteries items".²⁴

The WEEE Directive's provisions only become relevant to components, sub-assemblies and consumables when these materials are part of the EEE product "at the time of discarding."²⁵ So, for example, if a printer cartridge is disposed of with a waste printer it will be considered as WEEE, but if that printer cartridge is removed from the printer before it is disposed of as waste it should not be considered as WEEE.²⁶

It is likely that there are tens of thousands of products covered by the WEEE Directive. Household, professional, and some industrial EEE, are covered.²⁷ How did the co-legislators, Council and European Parliament (EP), deal with letting producers know if their product is covered? The legislative language used is designed to avoid the need to update the list for every new invention or re-branding of a product; and not having a list in the Official Journal of the Communities with tens of thousands of products, in need of constant revision and updating. The regulatory machine would find it difficult to name every item on the market that falls under its scope. This legislation avoids this dilemma.

As discussed above the WEEE Directive applies to "electrical and electronic equipment falling under the categories set out in Annex IA."²⁸ Annex IA contains an exhaustive list of 10 categories of electrical and electronic equipment covered by the Directive. The Annex IA list is supplemented by an illustrative list of products in Annex IB. This list mentions 100 separate items of EEE, 75 in specific terms, for example, notebook computers.²⁹ Also, there are 25 broad "catch all" terms, for example, "other products or equipment of transmitting sound, images or other information by telecommunications",³⁰ means that despite no explicit mention, a discarded PDA would be covered by the WEEE Directive.

So, whilst the household kettle is not explicitly mentioned in Annex IB, a kettle would, nonetheless meet the tests laid down in Art.3 (a) of being powered by electricity, falling under Annex IA (a small household appliance), and being powered by normal electricity current. It would not fall under the exemptions provided for.³¹ A producer, unsure if their product is covered, can go through this test. If unsure, they can contact the Commission Services or Member State enforcement authorities for clarification.³²

EEE under the RoHS Directive

The ROHS Directive restricts certain hazardous substances in new EEE.³³ The scope of the RoHS Directive is similar to the WEEE Directive. The RoHS restrictions cover the following Annex IA WEEE restrictions:

1. large household appliances;
2. small household appliances;
3. IT and telecommunications equipment;
4. consumer equipment;
5. lighting equipment;
6. electrical and electronic tools (with the exception of large-scale stationary industrial tools);
7. toys, leisure and sports equipment;
8. automatic dispensers;
9. luminaries in households; and
10. electric light bulbs.³⁴

The scope of the RoHS Directive is meant to correspond to the WEEE Directive,³⁵ but for those few explicit exemptions.³⁶

The WEEE and ROHS Directives are designed to work together. This is not surprising, as early drafts of the proposed WEEE and RoHS Directive were combined in one draft Directive,³⁷ only to be split

²² Page 28, Explanatory Memorandum, Art. 3.

²³ WEEE Art. 3(b) clarifies that WEEE "is waste within the meaning of Article 1(a) of Directive 75/442/EEC, including all components, subassemblies, and consumables which are part of the product at the time of discarding."

²⁴ See Explanatory Memorandum, p.28, Art. 3.

²⁵ *Ibid.*

²⁶ See, answer given by Mrs. Wallström on behalf of the Commission to written question/ E-2666/03 (5 November 2003).

²⁷ See, WEEE Recital 10: "This Directive should cover all electrical and electronic equipment used by consumers and electrical and electronic equipment intended for professional use ..."

²⁸ WEEE Art. 2(1).

²⁹ WEEE Annex IB, Category 3, item 8.

³⁰ Annex IB, Category 3, and item 23.

³¹ WEEE Art. 2(2) and 2(3).

³² Contact: European Commission, DG Environment, Unit A2, B-1049, Brussels, Belgium. Tel: 00 32 2 296 09 43, Email: ENV-ROHS@cec.eu.int.

³³ Article 4(1): "Member States shall ensure that, from July 1 2006, new electrical and electronic equipment put on the market does not contain lead, mercury, cadmium, hexavalent chromium, polybrominated biphenyls(PBB) or polybrominated diphenyl ethers (PBDE)."

³⁴ RoHS Art. 2(1).

³⁵ Page 32, Explanatory Memorandum, Art. 2: "The scope corresponds to the scope defined by Article 2 of the WEEE Directive".

³⁶ RoHS does not cover products listed in Annex IA categories 8 (medical devices) and 9 (Monitoring and control instruments), or the exemptions listed in RoHS Art. 2(2) and 2(3).

³⁷ For a copy of an early draft proposed text @: http://www.commercialdiplomacy.org/ma_projects/ma_wavra3.htm

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later on after lobbying from industry.³⁸ So, a producer whose product is covered by the WEEE Directive is likely also to be impacted by the RoHS Directive.

What EEE is not covered by the WEEE and RoHS Directives?

EU product regulation tends to define the item for regulation, the scope of the restrictions to the general rule, and then detail exemptions. The WEEE and RoHS Directives take a similar approach. Whilst the WEEE Directive covers most EEE it does not cover all.³⁹

This section details the exemptions provided under (1) the WEEE and (2) the RoHS Directive.

Exemptions under the WEEE Directive

The WEEE Directive provides that following electrical and electronic equipment is not covered:

- i. equipment designed for use with a voltage rate exceeding 1000 Volt for alternating current and 1500 Volt for direct current, or below;⁴⁰
- ii. large scale stationary industrial tools;⁴¹
- iii. equipment which is part of another type of product that does not fall with the scope of this Directive;⁴² and
- iv. equipment covered by specific Community waste management legislation;⁴³
- v. military equipment.⁴⁴

Exemptions under the RoHS Directive

The RoHS Directive provides that following equipment is not covered:

- i. equipment which is not dependent on electric currents or electromagnetic fields;⁴⁵
- ii. equipment designed for use with a voltage rate exceeding 1000 Volt for alternating current and 1500 Volt for direct current, or below;⁴⁶
- iii. equipment in WEEE Annex IA categories 8 and 9;
- iv. equipment not covered by specific Community waste management legislation;⁴⁷ and
- v. spare parts for the repair, or reuse of electrical and electronic equipment put on the market before 1 July 2006.⁴⁸

Analysis of the Exemptions

Military equipment

The Community has limited competence in matters relating to the military. The general rule in Art. 296⁴⁹ is raised in Art. 2(3) WEEE⁵⁰ which provides "... equipment which is connected with the protection of the essential interests of the security of Member States, arms, munitions and war material" shall be excluded from this Directive. This does not, however, apply to products which are not intended for specifically military purposes.

The RoHS Directive does not contain this corresponding provision. The impact of the RoHS Directive applying to military equipment that falls within

categories 1–7 and 10 could be severe. It is not an issue of applying the RoHS restrictions to bullets and guns, because they are not covered by the WEEE Directive, but more to specially designed equipment for the military, enhanced to cope with the vagaries of military use.

Whilst the RoHS Directive does not mention the same military exemption it is presumed that the scope of the WEEE and RoHS Directives correspond. This presumption can be based only on the general rule of thumb that the scope of the WEEE and RoHS is meant to correspond. This would mean that military mobile phones, which may, for example, require the

³⁸ For an analysis of earlier draft proposed see: "Revised statement for ACEI Europe prepared by Rod Hunter and Marta Lopez Torres, Hunton & Williams, Legality under International Trade Law of the Draft Directive on Waste from Electrical and Electronic Equipment, August 17, 1999." @ http://www.commercialdiplomacy.org/ma_projects/ma_wavra2a.htm

³⁹ WEEE Recital 10: "This Directive should cover all electrical and electronic equipment used by consumers and electrical and electronic equipment intended for professional use. This legislation should apply without prejudice to Community legislation on safety and health requirements protecting all actors in contact with WEEE as well as specific Community waste management legislation, in particular Council Directive 91/157/EEC of 18 March 1991 on batteries and accumulators containing certain dangerous substances."

⁴⁰ WEEE Art. 3(a), for example, a petrol driven lawnmower, or a gas cooker.

⁴¹ WEEE Annex IA, Category 6.

⁴² WEEE Art. 2(1).

⁴³ WEEE Art. 2(2).

⁴⁴ WEEE Art. 2(3): "Equipment which is connected with the security of the essential interests of the security of Member States, arms, munitions and war material shall be excluded from this Directive. This does not, however, apply, to products that are not intended for specifically military purposes"

⁴⁵ RoHS Art. 3(a), for example, a gas cooker.

⁴⁶ RoHS Art 3(a).

⁴⁷ RoHS Art. 2(2).

⁴⁸ RoHS Art. 2(3).

⁴⁹ Article 296 Treaty (ex Art. 223) "The provisions of this Treaty shall not preclude the application of the following rules: ... (b) any Member States may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war materials; such measures shall not adversely affect conditions of competition in the common market regarding products which are not intended for specifically military purposes"

⁵⁰ WEEE Art. 2(3): "Equipment which is connected with the protection of the essential interests of the security of Member States, arms, munitions and war material shall be excluded from this Directive. This does not, however, apply to products which are not intended for specifically military purposes."

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addition of radioactive protective lead in the equipment, are not covered by Category 3 Annex IA. As it is a presumption it is dependent on Member States agreeing that this is the case. Otherwise, a producer could apply for an exemption under RoHS Art. 5(1)(b).

Batteries

The RoHS Directive restricts certain heavy metals, lead, mercury, cadmium, and hexavalent chromium, or the flame retardants, PBB or PBDE in new electrical and electronic equipment put on the market from 1 July 2006.⁵¹ Unless less otherwise exempted, the use of these heavy metals and flame retardants is banned in the use of new EEE from 1 July 2006. The WEEE Directive provides for, amongst other things, includes "all components, subassemblies and consumables which are part of the product at the time of discarding".⁵² This covers batteries. Also, the WEEE Directive requires the removal of batteries from separately collected WEEE.⁵³

There is existing legislation on batteries, the Battery Directive, 91/157/EC on batteries and accumulators containing certain dangerous substances, restricts the use of, amongst other substances, lead, mercury and cadmium for most batteries and accumulators.⁵⁴

The RoHS Directive defines its scope by relationship to the WEEE Directive. Whilst RoHS covers EEE, it does not specify whether it also covers "components, sub assemblies and consumables". Are those batteries, which are subject to the Batteries Directive part of EEE and covered by the RoHS Directive?

The Batteries Directive allows the limited use of lead, cadmium, and mercury in batteries⁵⁵ after 1 July 2006 but the RoHS Directive restricts the use of lead, cadmium and mercury in EEE from 1 July 2006.

Community environmental legislation provides for a standard clause "no conflict clause" with existing environmental legislation. The co-legislators had this in mind in the WEEE and RoHS Directive. Article 2(2) of the RoHS Directive states: "This Directive shall apply without prejudice to Community legislation on safety and health requirements and specific Community waste management legislation." The thinking behind this is clarified in Recital 9 that states:

"This Directive shall apply without prejudice to Community legislation on safety and health requirement and specific Community waste management legislation, in particular Council Directive 91/157/EEC of 18 March 1991 on batteries and accumulators concerning certain dangerous substances".

The WEEE Directive contains a "no conflict" provision with the Batteries Directive. Article 2(2) states: "This Directive shall apply without prejudice to Community legislation on safety and health and specific Community waste management legislation." The thinking behind this article is clarified in Recital 10, which states:

"This Directive should apply without prejudice to Community legislation on safety and health requirements and specific Community waste management legislation, in particular Council Directive 91/157/EEC of 18 March 1991 on batteries and accumulators containing certain dangerous substances".

Indeed, the WEEE Directive calls for the revision of the Batteries Directive in Recital 11: "Directive 91/157/EEC needs to be revised as soon as possible, particularly in light of this Directive".

The European Commission published a proposal for a revision of the Batteries Directive.⁵⁶ The Commission noted that:

"the RoHS Directive does not apply to batteries. However, batteries incorporated in electrical and electronic equipment, the moment the equipment becomes waste, will be collected together with the equipment on the basis of the WEEE Directive. The battery producers will become responsible for further treatment once the battery is removed from the equipment after collection".⁵⁷

This will mean that the battery producer, and not the EEE producer, will be liable for the treatment of the batteries.

Spare parts

A specific exemption is provided for spare parts for the repair of EEE put on the market before 1 July 2006.⁵⁸ Spare parts that do not comply with the RoHS Directive can be manufactured after 1 July 2006. These spare parts can only be used in old EEE, that is EEE put on the market before 1 July. This ensures that old EEE can be maintained and prevented from becoming waste.

However, the exemption is framed to prevent retrofitting new EEE with RoHS non-compliant parts. Exemptions under Community law are interpreted narrowly and this is the case here. Manufacturers who re-use parts of old EEE in new equipment will not be able to use RoHS non-compliant parts after 1 July 2006.

It seems from Parliamentary Questions on the issue, that some photocopier manufacturers re-use parts several times and these parts may be RoHS non-

⁵¹ RoHS Article 4(1)

⁵² WEEE Article 3(b)

⁵³ WEEE Annex II, 3rd indent.

⁵⁴ Council Directive 91/157/EEC, on batteries and accumulators containing certain dangerous substances, 26.3.1991, L 78/38 (as amended).

⁵⁵ Annex I, Directive 91/157/EEC, *ibid*.

⁵⁶ "Proposal for a Directive of the European parliament and of the Council on Batteries and Accumulators and Spent Batteries and Accumulators" COM (2003) 723 final.

⁵⁷ Page 8, *ibid*.

⁵⁸ Article 2(3): "This Directive does not apply to spare parts for the repair, or to the reuse, of electrical and electronic equipment put on the market before 1 July".

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compliant. Some photocopier manufacturers raised this issue by way of a Parliamentary Question.⁵⁹ The Commission clarified that new photocopiers put on the market after 1 July 2006 could not use RoHS non compliant parts.

However, the RoHS restrictions apply to new equipment. Equipment that is marketed as re-manufactured is not new EEE and so could continue to reuse the RoHS non compliant parts. Producers could bypass the RoHS restrictions by selling old products. This is unlikely as remanufactured products sell for a substantial discount, and producers are reluctant to retail their products as second-hand or remanufactured.

Also, whilst RoHS non-compliant spare parts can still be produced for old EEE this will be a niche area. For example, whilst there are exemptions for the use of leaded solder in chips, the chip manufacturer industry will shift away from lead. Leaded solder chips costs will rise significantly and will force even those who have been provided with an exemption to use leaded solder⁶⁰ to move away from its use. In an industry that is dependent on large volumes for low prices, bespoke part manufacturing is a legal but not economic option.

Whilst this may lead to unintended consequences, for example, stopping the re-use of old equipment, the option is for a producer to seek an exemption under Art. 5(1)(b) RoHS Directive.

Car radios

Some electric and electronic devices like car radios, car stereos can be bought in shops and installed in vehicles. The question is whether these devices are subject to the WEEE, RoHS or End of Life Vehicles (ELV) Directive?⁶¹

Article 2(2) of the RoHS and WEEE Directives states that "This Directive shall apply without prejudice to Community legislation safety and health requirements and specific Community waste management". So, if the radio is not specifically designed to be used in a vehicle, that device should be covered by the RoHS and WEEE directive. But, if the device is designed with the primary purpose to be used in vehicles, like a car radio, the ELV Directive applies.

Dealing with borderline products

The WEEE and RoHS Directives provide general rules for determining if a product is covered by the Directive or not. However, with tens of thousands of electrical and electronic separate items of equipment it is likely that confusion will exist on whether an item is covered, and if it is, what category it falls under. Different categories under Annex IA carry different recovery burdens that producers must meet. Four groups⁶² of recovery, re-use and recycling targets are set down for producers, to be reached by 31 December 2006.⁶³

The WEEE Directive does not provide guidance if

equipment falls within two categories, for example, a dual-use sports watch with heart monitoring equipment. This will be a matter for Member States or the Commission, or both, to inform producers on a case-by-case basis.⁶⁴

IV. Environmental product regulation – issues to resolve

Product design

The WEEE Directive contains a potentially far reaching provision on product design.

Article 4 WEEE deals with product design and hangs on a loose limb to the rest of the WEEE Directive. It provides that Member States shall:

1. '(i) encourage the design and production of electrical and electronic equipment (ii) which take into account and facilitate dismantling and recovery, (iii) in particular the reuse and recycling of WEEE, their components and materials. and⁶⁵
2. take appropriate measures so that producers do not prevent, through specific design features or manufacturing processes, WEEE from being reused, unless
3. such specific design features or manufacturing processes present overriding advantages, for example, with regard to the protection of the environment and/or safety requirements."

Article 4 is directed against the ink jet cartridge manufacturers. Article 4 was the subject of an amendment from European Parliament (EP). They clarify their objective as:

"the need for reuse and recycling. This is clearly at odds with the practices adopted by individual producers who build in various electronic devices ('clever chips') to prevent equipment from being reused or recycled. Ink jet cartridges for printers, in

⁵⁹ See: Written Question E-0789/03 by Ria Oomen-Ruijten (PPE-DE) and Alexander de Roo (Verts/ALE) to the Commission. (5 March 2003).

⁶⁰ RoHS Annex Items 6 & 7.

⁶¹ Article 3(1) Directive 2001/53/EC, on end-of-life vehicles, OJ 21.10.2000 L269/34.

⁶² Group 1 – Category 1: 80%, 75%, 75% – Recovery, Reuse, Recycling

Group 2 – Category 2: 70%, 50%, 50% – Recovery, Reuse, Recycling

Group 3 – Category 3 & 4: 75%, 65%, 65% – Recovery, Reuse, Recycling

Group 4 – Category 5, 6, 7: 70%, 50%, 50% – Recovery, Reuse, Recycling

⁶³ Article 7(2).

⁶⁴ See following for discussion on Guidance.

⁶⁵ Numbering added.

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particular, are fitted with such devices to prevent them from being refilled".⁶⁶

The EP states the text means:

"In order to discourage such practices, a new article (Article 4) has been inserted in the text of the Directive providing that dismantling and recovery shall be facilitated at the production stage. In particular, technical design features which prevent equipment from being reused are avoided".⁶⁷

If the EP's interpretation is correct, the WEEE Directive could be viewed as two Directives in one, one about WEEE, and an ancillary objective on product design. A brief survey of Member States and the Commission interpretation of Art. 4 reveals that Parliament's objective has not been achieved.

The Commission has taken a restrictive view of Art.

4. The Commission stated its view as:

"A cartridge fitted with smart chips would not fall within the definition of electrical and electronic equipment in Article 3(a) and so would not benefit from whatever protection is offered by Article 4."⁶⁸

Member States implementing measures do not adopt a view in line with the EP.

This restrictive view is at odds with the EP's view. Unless the EP, or a Member State challenges this interpretation, or it is challenged through an Art. 177 reference, a very narrow interpretation of Art. 4 will be taken by the Commission and Member States. Parliament, whilst it may have intended to limit a business model in the printer cartridge industry, has not achieved it.

Is Deca-BDE banned?

There seems to be confusion if the brominated flame retardant, Deca-BDE, is banned under the RoHS Directive. Deca-BDE is a brominated flame retardant, used in the electrical and electronic equipment to prevent fires. It is also a hazardous substance, harmful to the environment and human health. It is surprising that there should be doubt as to the legal status of a ban.

The confusion is shown by some parts of industry and sometimes the Commission Services. For example, during a recent stakeholder consultation⁶⁹ under the RoHS Directive, Albemarle, as US producer of Deca-BDE stated that:

"Albemarle understands that Deca-BDE is currently exempt from the restrictions of Article 4(1) of RoHS by virtue of its being listing in the Annex, and that the Commission is currently reviewing this exemption pursuant to Point 10 of the Annex in order to adopt a possible amendment pursuant to the procedure of Article 7(2) of RoHS ..."⁷⁰

Also, it has been reported that the Commission Services were in two minds on whether Deca-BDE was banned, issuing contradictory interpretations. It was reported in the specialist environmental press that the Commission Services gave their opinion that Deca-BDE was not banned,⁷¹ to the surprise of Parliamentarians who worked on the RoHS Directive.⁷² Less

than a month later the confusion was clarified as the Commission agreed that Deca-BDE is indeed banned.⁷³

But is the question still open? The case for considering Deca-BDE banned is that Art. 4(1) RoHS restricts the use of the brominated flame retardants, polybrominated biphenyls (PBB) or polybrominated diphenyl ethers (PBDE). Whilst not explicitly mentioned, it seems that the Commission intended all the BDEs to be covered by the restrictions.⁷⁴ Also, the reference to Deca-BDE in item 10 of the Annex, can be interpreted as meaning Deca-BDE is banned and subject to an on going risk assessment, to be used to consider whether the ban should be lifted.

An alternative view is that to ban Deca – BDE it is necessary to refer to it explicitly to ban it, and secondly, its appearance in the Annex suggests it is un-banned. Article 4(2) states that the ban will not apply "the applications listed in the Annex". The Explanatory Memorandum states that "The exemptions from the substance phase-out are listed in the Annex to the Directive".⁷⁵

As a general rule of law, a ban in law should be clear and precise. A plain and literal interpretation of Item 10(i) suggests that Deca-BDE is not yet banned under the RoHS Directive. Item 10 lists three other items mentioned in the exemption list that could be considered "as soon as possible" to review the exemption. Deca-BDE's presence in this category suggests it is not yet banned.

⁶⁶ See "Report on the joint text approved by the Conciliation Committee for a European Parliament and Council Directive on waste electrical and electronic equipment (WEEE)", 5 December 2002. FINAL A5-0438/2002. PE 287.616.

⁶⁷ See "Report on the joint text approved by the Conciliation Committee for a European Parliament and Council Directive on waste electrical and electronic equipment (WEEE)", 5 December 2002. FINAL A5-0438/2002. PE 287.616.

⁶⁸ See, answer given by Mrs Wallström on behalf of the Commission to written question/ E-2666/03, 5 November 2003.

⁶⁹ See, Contributions to the Stakeholder Consultation on possible amendment of the Annex of Directive 2002/95/EC' submission of Albemarle Corporation @ http://europa.eu.int/comm/environment/waste/weee_index.htm

⁷⁰ *Ibid.*

⁷¹ See ENDS Daily, Issue 1620, Wednesday 3 March 2004, EU electronics rules "exempt Deca-BDE".

⁷² See ENDS Daily, Issue 1627, Friday 12 March 2004, "MEPS challenge deca-BDE 'exemption'".

⁷³ ENDS Daily, Issue 1641, Thursday 1 April 2004, "Commission flip-flops on deca-BDE exemption".

⁷⁴ Page 32, Explanatory Memorandum: "Article 4 lays down the requirement to substitute ... the brominated substances – PBDE, including in particular 5-BDE, 8-BDE and 10-BDE and PBB (polybrominated biphenyls)."

⁷⁵ *Ibid.*, p.32.

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The alternative view, put forward by Parliamentarians, is that whilst Item 10 is confusing, it is a mistake, and should not appear as it does. Whilst this may go against what the co-legislators intended, if they did not state it, or the final published Directive did not state it, there is no good legal reason to allow them now to say it says something it does not say on a normal reading of the text. The co-legislators could, as they have already shown themselves able to do,⁷⁶ have a second go, and pass a new amending Directive to cover an apparent loophole.

Guidance for legislation

There appears to be regulatory uncertainty with an absence of clear guidelines for regulators and producers. This could be considered a concern as Member States needed to transpose the WEEE and RoHS Directives into national law by 13 August 2004. Confusion on what the scope of the Directives was a reason for the delay in the transposition. The question of the uncertainty has led the UK House of Lords Select Committee to consider the issue directly in their enquiry on EU Waste Policy.⁷⁷ The House of Lords touched on the WEEE Directive.

The UK and other Member States called for criteria to determine the scope of the WEEE and RoHS Directives.⁷⁸ This was to enable a common approach to be taken by Member States in saying whether a product is covered or not by the Directives. For example, whilst large or industrial versions of normal household appliance, e.g. a toaster, would fall under the scope of the WEEE Directive⁷⁹ opinions may differ as to whether a very large oven⁸⁰ in a cake factory is "large stationary equipment" and falls under the exemption for large-scale industrial tools.⁸¹

Neither Directive gives guidelines on how to decide such cases. Member States view these matters in different ways, so, in difficult cases, which are likely to be exceptional, equipment will be covered by the WEEE Directive (and so also the RoHS Directive) in some Member States, while other Member States take a different view. This would mean that in some countries products containing RoHS hazardous substances would be banned from sale and in others they would be sold.

The House of Lords was critical of the absence of firm guidance for producers on whether products were covered. They commented that: "In relation to the WEEE Directive, it is regrettable that, as we report, so much remains to be settled. It is impossible for those affected by the Directive to run their businesses without timely decisions on these matters."⁸²

They were concerned that the scope of the Directive was not determined during legislative negotiations. The Committee's opinion is that:

"It could be argued that questions about the scope of these Directives fell within the area of significant policy and should therefore have been addressed during the co-decision process, when they would

have been subject to the full scrutiny of the European Parliament, as well as open to scrutiny by national parliaments. We do not accept that there was a lack of time available to raise substantive issues. As we note above, initial discussions concerning waste streams began as long ago as 1991; the Fifth Environmental Action Programme, adopted in 1993, contained a commitment to regulate WEEE as a priority waste stream; and the Directive took two and a half years to emerge from co-decision."⁸³

Guidance from the Community – the TAC

The WEEE and RoHS Directives provide for the delegation of rule making powers to the "Committee for the Adaptation to Scientific and Technical Progress of EC-Legislation on Waste" (TAC). The WEEE and RoHS Directives, in narrowly construed areas, provide for the delegation of legislative power to this Committee.

This Committee is provided for under Art. 14 of the WEEE Directive and Art. 7 of the RoHS Directive. The TAC on WEEE and RoHS meets regularly and has its own rules of procedure.⁸⁴

Details of their proceedings are made available by some Member States⁸⁵ and from the Commission by way of a request for access to information for the minutes. Its members are the European Commission and Member States. Observers are made up of the EEA Member States, the European Environment Agency, and Accession States.

The TAC meets in two capacities, one as a Regulatory Comitology Committee⁸⁶ and second to

⁷⁶ See, Directive 2003/108/EC of the European Parliament and of the Council of 8 December 2003 amending Directive 2002/96/EC on waste electrical and electronic equipment (WEEE) (OJ 31.12.2003 L345/106).

⁷⁷ See, European Select Committee Forty-seventh Report, European Union Waste Management Policy, @ <http://www.publications.parliament.uk/pa/ld200203/ldselect/lducom/lducom.htm#reports>

⁷⁸ Page 20, paragraph 5. DETR. Discussion Paper of 28 March 2003, @ http://www.dti.gov.uk/sustainability/weee/index.htm#Latest_EU_developments

⁷⁹ WEEE Annex IB, Category 2 "Toasters".

⁸⁰ WEEE Annex IB, Category 1, Large household appliances: Item 8: Cooker.

⁸¹ WEEE Annex IB, Category 6 – "with the exception of large-scale stationery tools".

⁸² *Ibid.*, footnote 78, p.30, Conclusion, point iv.

⁸³ *Ibid.*, Paragraph 32.

⁸⁴ Rules of Procedure for the Committee for the Adaptation to Scientific and Technical Progress of EC-Legislation on Waste. 17 August 1993.

⁸⁵ The UK publish unofficial minutes available at: http://www.dti.gov.uk/sustainability/weee/index.htm#Latest_EU_developments

⁸⁶ Article 2(a) Rules of Procedure.

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allow for discussion on any other questions.⁸⁷ The TAC is a Regulatory Comitology Committee established by Art. 18 of the Waste Framework Directive.⁸⁸ As a Regulatory Committee that can make decisions on those matters that the WEEE⁸⁹ and RoHS⁹⁰ Directives have delegated to it to legislate on. The co-legislators have delegated the substantive power to the TAC to add or withdrawal products from the coverage of the WEEE and RoHS Directives.

The Committee also meets to share information and experience on regulatory issues. The TAC is considering guidelines for the scope of the WEEE and RoHS Directive. The guidelines are to consider the parameters, borderline, and products in or out. The Commission does not view these guidelines as having any legal status. They are only persuasive. Guidelines issued by the TAC and supported by the European Commission give an indication of the Commission's position as to how they view provisions of the Directive. It is indicative of the legal position that would be taken on possible implementation actions. As such guidelines have a substantial influence on Member States and third parties.

However, it is questionable whether the TAC should be considering such matters. Guidelines on the scope of the Directive are substantial matters. The WEEE and RoHS Directives provide that the Commission shall be assisted by a Regulatory Committee. Article 18 of the Waste Framework Directive provides for a Regulatory Committee but it does not provide for a committee to consider matters that legislation has not asked it to consider. Article 2(b) of the Rules of Procedure mentions "any other business", which could be notification to the Committee of a legislative proposal. The UK House of Lords Select Committee implicitly raises the legal authority of the TAC to provide guidance on the scope of the Directive arguing that this is a substantive question that should be determined by the co-legislators.

The House of Lords provides a hard critique of the absence of clear guidelines when it states that:

"The timetable set out in the WEEE Directive gives the UK until 13 August 2004 for transposition. The discussions in the technical adaptation committee appear to cover a significant range of issues, and until the precise scope of the Directive has been settled there is bound to remain significant uncertainty about the practical implications for industry, regulators and consumers over the coming months. It is regrettable that, as we report, so much remains to be settled. It is impossible for those affected by the Directive to run their businesses without timely decisions on these matters."⁹¹

Also, the powers of the TAC are de-limited by the WEEE and RoHS Directives, the Treaty,⁹² and the Comitology Decision.⁹³ The dilemma is that guidelines may not only interpret but re-interpret the law in the interests of administrative efficiency or expediency. Whilst the RoHS Directive provides for the change its

scope and enables items to be added to, or removed from, the exemption list the WEEE Directive does not. The co-legislators set down general rules for determining what WEEE with very limited exemptions. Annex IB can be alerted by way of a Comitology Decision⁹⁴ and a review clause⁹⁵ re-opens the Directive to review by 13 February 2008.

However, the TAC has not been confined by a strict approach and has taken "any other business" in the broadest sense. It has taken the view that "singing postcards" are not covered by the WEEE Directive.⁹⁶ They have reasoned that as "singing postcards" primary purpose is not EEE it should not be covered. Whether excluding singing postcards from the scope of the WEEE Directive is beneficial from the viewpoint of the environment, and there are many reasons to support this view, it is difficult to see why it is not EEE under the WEEE Directive.

Whilst this practice is convenient and expedient it is not sure whether it is legal. The power of the administration is confined by law, and the legal authority of the TAC to consider matters beyond that provided by enabling or secondary legislation is doubtful. Parliament and Council should clarify this legal gap.

Even after the Commission published its guidance,⁹⁷ it is likely that there will be cases where the same electrical or electronic product will be treated differently in different Member States under the same WEEE and RoHS Directives.

"Put on the market"

The words "put on the market" come up in Art. 10(3) of the WEEE Directive and Art. 4(1) of the RoHS

⁸⁷ Article 2(b) Rules of Procedure.

⁸⁸ Article 18.

⁸⁹ WEEE Arts 11(2), 12, 13 and Annex II, Item 4.

⁹⁰ RoHS Annex, Item 10, and Art. 5(1).

⁹¹ *Ibid.*, footnote 78, Paragraph 33.

⁹² Article 211(4): "In order to ensure the proper functioning of the and development of the common market, the Commission shall: exercise the powers conferred on it by the Council for the implementation of the rules laid down by the latter"

⁹³ Council Decision 1999/468/EEC, laying down the procedures for the exercise of implementing powers conferred on the Commission, OJ 17.7.1999, L 184/23.

⁹⁴ WEEE Art. 13.

⁹⁵ WEEE Art. 17(5).

⁹⁶ See, Unofficial note of meeting of Technical Adaptation Committee Sub-Group on scope of the WEEE and RoHS Directives 11 July 2003, @ http://www.dti.gov.uk/sustainability/weee/index.htm#Latest_EU_developments.

⁹⁷ "Frequently Asked Questions on Directive 2002/95/EC on Restriction of the Use of certain Hazardous Substances in Electrical and Electronic Equipment (RoHS) and Directive 2002/96/EC on Waste Electrical and Electronic Equipment (WEEE)". European Commission. Directorate General Environment, May 2005.

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Directive. They are clearly key to understanding both Directives. However, the term "put on the market" is not defined in the WEEE or RoHS Directives definitions Article,⁹⁸ or the Explanatory Memorandum to the Commission's proposal.

Similar terms are used in many Directives, such as internal market Directives based on the New Approach and Global Approach. The Guide to the implementation of directives based on the New Approach and the Global Approach defines "placing on the market" as:

"A product is placed on the Community market when it is made available for the first time. This is considered to take place when a product is transferred from the stage of manufacture with the intention of distribution or use on the Community market. Moreover, the concept of placing on the market refers to each individual product, not to a type of product, and whether it was manufactured as an individual unit or in series."⁹⁹

The transfer of the product takes place either from the manufacturer, or the manufacturer's authorized representative in the Community, to the importer established in the Community or to the person responsible for distributing the product on the Community market. The transfer may also take place directly from the manufacturer, or authorised representative in the Community, to the final consumer or user.

The product is considered to be transferred either when the physical hand-over or the transfer of ownership has taken place. This transfer can be for payment or free of charge, and it can be based on any type of legal instrument. Thus, a transfer of a product is considered to have taken place, for instance, in the circumstances of sale, loan, hire, leasing and gift.

On the other hand, a product is not placed on the market when:

"transferred from the manufacturer in a third country to an authorised representative in the Community whom the manufacturer has engaged to ensure that the product complies with the directive; transferred to a manufacturer for further measures (for example assembling, packaging, processing or labelling); not (yet) granted release for free circulation by customs, or has been placed under another customs procedure (for example transit, warehousing or temporary importation), or is in a free zone; manufactured in a Member State with a view to exporting it to a third country; displayed at trade fairs, exhibitions or demonstrations; or in the stocks of the manufacturer, or the authorised representative established in the Community, where the product is not yet made available, unless otherwise provided for in the applicable directives."

It is worth noting that reliance on the definition offered in a guidance document is problematic. The New Approach guidelines may be revised and new interpretations offered. So whilst legal certainty

dictates that legal interpretations do not change this certainty is not offered by the New Approach guidelines.

Whilst the terms "place" and "put" are similar, they are different terms. It is reasonable to consider that if legislators used a different term they intended a different result. The alternative could be that the legislators did not know what they meant, or different legislators had differing views on what the term meant. An alternative plain and literal interpretation of "put on the market" refers to a ban on sale. This interpretation is based on grounds of interpretation and policy considerations. The RoHS Directive provides that "Member States shall ensure that from 1 July 2006, new electrical and electronic equipment put on the market does not contain the named restricted substances."¹⁰⁰

National measures restricting or prohibiting the sale of these substances in electrical and electronic equipment which were adopted in line with Community legislation before the adoption of this Directive may maintained until 1 July 2006. (Art. 4(1)).

This could be interpreted as meaning that no EEE containing these products can be sold at all from 1 July 2006. This is a credible view because Member States with existing laws on restricted substances maintain the bans on sale of EEE containing restricted substances until 1 July 2006, and then adopt the Community standards.

But, placing on the market means that an EEE with restricted substances will be in free circulation in the Community for several months after the 1 July 2006. An electrical product containing, say, lead could be legally sold in a country with pre-existing restrictions after 1 July 2006 on the basis of the new approach. A ban on sale also makes sense from an enforcement perspective. It can take several months and for some products years from the departure from the manufacturers to being sold. Many products will be on the market after 1 July 2006 containing the banned substances. This will make the job of enforcing the standards more difficult.

Despite what the legislation may have intended the Commission and Member States have taken the view that "put on the market" is to be given the same meaning as that given to "place on the market" in the New Approach guidelines.

Marking

The WEEE Directive provides for two marking requirements, one a "crossed out wheeled bin",¹⁰¹

⁹⁸ WEEE and RoHS Art. 3.

⁹⁹ <http://europa.eu.int/comm/enterprise/newapproach/legislation/guide/index.htm>, P18.

¹⁰⁰ RoHS Art. 4(1).

¹⁰¹ WEEE Art. 10(3).

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and the other that is being prepared by the standardisation committee – European Committee for Electrotechnical Standardization (CENELEC). Standardisation is highlighted by the Commission as one possible root for implementing IPP¹⁰² environmental product policy. Here I highlight issues of legal certainty and validity of such an approach.

Article 11(2) deals with information for treatment facilities. It provides for a similar but separate marking requirement to that provided for in Art. 10(3), that is marking requirement for a crossed out wheeled bin on most electrical and electronic products. The simple option of just using the same crossed out wheeled bin was rejected as some companies already mark some of their products with the crossed out wheeled bin.

The Commission provided CENELEC with a mandate to make a recommendation for a standard to fulfil the Art. 11(2) requirements. The standard¹⁰³ was ratified in early 2005.

The CENELEC standard provides for a mark to identify the producer and when the product is put on the market as required under Art. 11(2). A more sensitive matter, from a legal viewpoint, is that CENELEC standard also contains an exemption from the marking requirement. Clause 4(3) of the standard makes provisions for an exemption from the marking mandate. First it sets out conditions for being exempted, which are size and functionality.

If a producer meets one of these two criteria the marks (date and producer) can be put on:

- i. the flag on the fixed supply cord (if any), and
 - ii. operating instructions and warranty certificates;
- or
- iii. mark on packaging.

Whilst this may be practical it is likely not to be legal. There is confusion with a mistaken view that the limited derogation in Art. 10(3) for marking not to be on the products is imported into Art. 11(2). There is no such provision.

More simply the WEEE Directive does not provide for an exemption to the Article 11(2) requirement for “a mark on the appliance”. The Council and European Parliament called for “a mark on the appliance” covered by the Directive. This wording is clear. No provision is made for exceptions to the marking requirement like that provided in Art. 10(3). If the co-legislators had intended that they would have said so.

Second, the Art.11(2) requirement runs in conjunction with Art. 8 on “Financing in respect of WEEE from private households”. Article 8 (2) provides:

“For products put on the market later than 13 August 2005 ... Member States shall ensure that each producer provides a guarantee when placing a product on the market showing that the management of all WEEE will be financed and that producers clearly mark their products in accordance with Article 11(2).”

It would appear that the Art.11(2) marking requirement is key to ensuring that the individual finance approach taken for products put on the market after 13 August 2005 works. An individual finance approach requires products to be marked so the producer can pay for new WEEE.

Third, a key part of the provision is beyond the powers of the WEEE Directive, and should not have been inserted into the standard. Whilst compliance with the standard provides a presumption of conformity with the Directive. There is a presumption of conformity, where, legally, none exists.

The matter could be resolved if the Commission were to adopt a Decision on the marking requirement to comply with Art. 11(2). The Commission however sees its role as promoting “a recommendation”. So, a European standard contrary to the Directive is as adopted by in 2005. So far, the Commission have not published the standard in the Official Journal, until which it offers doubtful conformity with Community law.

Getting around the ban – overturning Parliament’s will

In June 2004 the European Commission launched a stakeholder consultation¹⁰⁴ to consider overturning a ban put in place less than 18 months previously. The Commission is considering overturning a ban on the use of certain heavy metals and certain brominated flame retardants in electrical and electronic equipment in 11 cases.¹⁰⁵ This section considers the background for this move, and the grounds and procedure for getting a ban lifted.

Background

In the early hours of 11 November 2002 the European Parliament and Council reached a political agreement after conciliation negotiations on Directive 2002/95/EC on the restriction of the use of certain hazardous substances in electrical and electronic equipment (RoHS).¹⁰⁶ The far-reaching RoHS Directive, in most cases, bans the use of commonly used heavy metals (lead, mercury, cadmium, and hexavalent chromium) and certain brominated flame retardants (polybrominated biphenyls (PBB) or polybrominated diphenyl

¹⁰² Page 9, Commission Communication on IPP, *ibid.* footnote 7.

¹⁰³ Standard EN 50419:2005 “Marking of electrical and electronic equipment in accordance with Article 11(2) of Directive 2002/96/EC”.

¹⁰⁴ “Stakeholder consultation on adaptation to scientific and technical progress under directive 2002/95/EC of the European parliament and of the council on the restriction of the use of certain hazardous substances in electrical and electronic equipment for the purpose of a possible amendment of the annex”. Details available @: http://europa.eu.int/comm/environment/waste/weee_index.htm.

¹⁰⁵ See *ibid.*, 1 p. 2.

¹⁰⁶ OJ 13.2.2003 L37/19.

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ethers (PBDE)) from new electrical and electronic equipment put on the market from 1 July 2006.¹⁰⁷

The restricted substances are extensively used throughout the electrical and electronic industry. Lead is used for solders for chips, hexavalent chromium is used as a coating on screws to prevent wear, and the flame retardants are used throughout the electrical and electronic products. All the substances have potential harmful effects on public health and the environment.¹⁰⁸

Adapting to the unknown

RoHS is based on the idea of substituting harmful substances with less harmful alternatives. With this in mind, where safer alternatives do not exist RoHS provides¹⁰⁹ for a list of exemptions from the ban and a means of adapting the list.

RoHS recognises that the regulators and co-legislators, Parliament and Council, did not, or could not, provide for a permanent list of banned or exempted uses of the hazardous substances and allows for additional items to be added or removed from the exemption list, or both.

The co-legislators were not in a position to know the state of knowledge when they agreed to the RoHS Directive. Many producers may have not known that they used certain hazardous substances before the legislation was agreed, and only upon reflection did some producers realise, or at least claim to realise, that there was no substitute available for the use of the hazardous substance.¹¹⁰ In light of representations to Member States, Member States and some producers submitted requests for additional exemptions according to Art. 5(1)(b) RoHS.

Exemptions from the ban

Article 4(2) provides for number of applications that are exempted from the restrictions and are detailed in the Annex. New exemptions can be granted if substitution is:

- technically impracticable; or
- scientifically impracticable; or
- the negative environmental, health and/or consumer safety impacts caused by substitution are likely to outweigh the environmental, health and/or consumer safety benefits outweigh the human and environmental benefits of the substitution.¹¹¹

Article 5¹¹² details the grounds and procedure for adding, or removing, or both, applications to the exemption Annex. The co-legislators opted for a regulatory affairs Comitology Committee to make the Decision to confirm or withdraw existing exemptions or add new exemptions.¹¹³

The European Commission has the discretion to initiate consideration of the issue as it has the sole right to make a Proposal for a Draft Decision. The Commission¹¹⁴ employed a technical consultant to assist them determine whether there were substitutes available.

The Consultant considered the following three questions to see if exemptions should be granted for the 13 exemptions requests:

¹⁰⁷ Article 4(1).

¹⁰⁸ See section 5, "Proposal for a Directive of the European Parliament and of the Council Explanatory Memorandum."

¹⁰⁹ Article 4(2): "Paragraph 1 shall not apply to the applications listed in the Annex."

¹¹⁰ Personal communication.

¹¹¹ Article 5(1)(b)

¹¹² Article 5: Adaptation to scientific and technical progress
1. Any amendments which are necessary in order to adapt the Annex to scientific and technical progress for the following purposes shall be adopted in accordance with the procedure referred to in Article 7(2):

- (a) establishing, as necessary, maximum concentration values up to which the presence of the substances referred to in Article 4(1) in specific materials and components of electrical and electronic equipment shall be tolerated;
- (b) exempting materials and components of electrical and electronic equipment from Article 4(1) if their elimination or substitution via design changes or materials and components which do not require any of the materials or substances referred to therein is technically or scientifically impracticable, or where the negative environmental, health and/or consumer safety impacts caused by substitution are likely to outweigh the environmental, health and/or consumer safety benefits thereof;
- (c) carrying out a review of each exemption in the Annex at least every four years or four years after an item is added to the list with the aim of considering deletion of materials and components of electrical and electronic equipment from the Annex if their elimination or substitution via design changes or materials and components which do not require any of the materials or substances referred to in Article 4(1) is technically or scientifically possible, provided that the negative environmental, health and/or consumer safety impacts caused by substitution do not outweigh the possible environmental, health and/or consumer safety benefits thereof.

2. Before the Annex is amended pursuant to paragraph 1, the Commission shall *inter alia* consult producers of electrical and electronic equipment, recyclers, treatment operators, environmental organisations and employee and consumer associations. Comments shall be forwarded to the Committee referred to in Article 7(1). The Commission shall provide an account of the information it receives.

¹¹³ Article 5 (1) *ibid.*, and Art. 7: Committee

1. The Commission shall be assisted by the Committee set up by Article 18 of Council Directive 75/442/EEC(10).
2. Where reference is made to this paragraph, Articles 5 and 7 of Decision 1999/468/EC shall apply, having regard to Article 8 thereof.

The period provided for in Article 5(6) of Decision 1999/468/EC shall be set at three months.

3. The Committee shall adopt its rules of procedure.

¹¹⁴ See, Stakeholder consultation on Adaptation to scientific and technical progress under Directive 2002/95/EC of the European Parliament and of the Council on the Restriction of the use of certain hazardous substances in electrical and electronic equipment for the purpose of a possible amendment of the annex.

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1. Do feasible substitutes currently exist in an industrial and/or commercial scale?
2. Do any restrictions apply to such substitutes?
3. What are the costs and benefits and advantages and disadvantages of such substitutes?

The Consultant recommended an exemption for most of the requests.¹¹⁵ The Commission put forward a Draft Decision in line with the Draft Recommendation, and Member States are voted to adopt the Decision.¹¹⁶

However, the questions raised by the consultant raised cost, and the answers given by stakeholders noted the cost of substitutes. The RoHS Directive does not permit cost as a factor. The Comitology Committee is legally bound to base its Decision on the open-ended grounds provided for by Art. 5(1)(b).

Article 5(1)(b) provides for a three-part test with several options on which to base a Decision. It provides enough room for manoeuvre to shroud political or economic reasons on the part of Member States. It is unlikely a Decision will be justifiable as it is so opaque and provides the Committee with wide-open intelligible principles to reach any decision.

But, the dilemma is that, if the Decision is based on the Consultant's report, it will be void as it based on a manifest error of law and a manifest error of fact. The Consultant asked the one question, cost, which RoHS does not entertain. Also, the Decision may be open to challenge on the basis of manifest error of fact. There may well be substitutes available, ones which whilst more expensive, are lead etc free. The TAC cannot ignore the existence of available substitutes, and the Commission should not put them forward for exemption if substitutes exist.

Comitology in a new Europe

When the European Commission puts forward a Draft Decision on the exemption requests the Decision will be voted on by 25 Member States by qualified majority vote. Votes taken after 31 October 2004 have as their voting rules those laid down by the Treaty of Nice.¹¹⁷ This provides for adoption only after the support by a double majority, i.e., a majority of Member States, also representing 62% of the EU population where the votes of the Member States' populations are weighted and at least 232 out of 321 votes.

Parliament's limited role

The European Parliament's (EP) role is limited in the process of revoking bans they backed in November 2002. The EP agreed to rules that allow the Commission and Council to agree to an expanded Annex, without new scientific or new technical evidence.

The EP's scrutiny of Decisions taken by a Regulatory Comitology Committee is limited. The Commission needs to send a draft Decision to the Parliament who have one month to comment. This period can be extended by extended by one month. Parliament can raise objections only if the Draft Decision goes beyond the scope of the enabling legislation. The EP can only object by absolute majority, i.e. 367 out of 732. On Tuesday 12 April (2005)¹¹⁸ the European Parliament¹¹⁹ took the unusual step of adopting a resolution asking the Commission to re-consider its proposal to exempt the use of the RoHS restricted substances in several applications. The objection will delay adoption procedure, and requires the Commission need to reconsider the Draft Proposal, and consider the Parliament's concerns. If they do so, they can adopt the Decision. If the EP object, their formal redress is through a challenge to the European Court of Justice, and through the informal root of political pressure on the Commission and Council.

¹¹⁵ See: ERA Technology – Reliability and Failure Analysis – Technical adaptation under Directive 2002/95/EC (RoHS) – Investigation of exemptions. December 2004.

¹¹⁶ See UK DTI's Unofficial note of the Technical Adaptation Committee on the WEEE & RoHS Directives, Brussels, 16 March 2005.

¹¹⁷ Germany: 29, United Kingdom: 29, France: 29, Italy: 29, Spain: 27, Poland: 27, Netherlands: 13, Greece: 12, Czech Republic: 12, Belgium: 12, Hungary: 12, Portugal: 12, Sweden: 10, Austria: 10, Slovakia: 7, Denmark: 7, Finland: 7, Ireland: 7, Lithuania: 7, Latvia: 4, Slovenia: 4, Estonia: 4, Cyprus: 4, Luxembourg: 4, Malta: 3. Total: 321.

¹¹⁸ ENDS Daily, Issue 1857, Tuesday 12 April 2005, 'MEPs escalate RoHS exemption row'.

¹¹⁹ European Parliament resolution on the draft Commission decision amending for the purposes of adapting to the technical progress the Annex to Directive 2002/95/EC of the European Parliament and of the Council on the restriction of the use of certain hazardous substances in electrical and electronic equipment (CMT-2005-151 and CMT-2005-642).